Supreme Court, U.S.
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In the Supreme Court of the United States

RODNEY BERNARD BARNO,
Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari to the
California Court of Appeal,
Fourth Appellate District, Division One

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the California Court of Appeal misinterpret the Sixth and Fourteenth Amendments when it ruled that petitioner's sentence of 50 years to life under the "three strikes" law was valid, even though the sentencing court used petitioner's prior juvenile adjudications to increase the maximum prison term, and facts underlying those prior adjudications were established at a juvenile court trial in which petitioner had no right to a jury?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Rodney Bernard Barno requests a writ of certiorari issue to the California Court of Appeal, Fourth Appellate District, Division One, to review its decision filed May 17, 2007. Appendix A. The California Supreme Court denied a petition for review by order dated August 8, 2007. Appendix B.

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

OPINIONS BELOW

The opinion of the California Court of Appeal and the order by the California Supreme Court summarily denying review are unpublished. Each is reproduced in the appendix to this petition.

JURISDICTIONAL STATEMENT

The opinion of the California Court of Appeal, Fourth Appellate District, Division One, was filed on May 17, 2007, as case number D045992. Appendix A. The California Supreme Court denied a timely petition for review on August 8, 2007. Appendix B. This Court has jurisdiction per 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to ... an im-

> partial jury of the State and district wherein the crime shall have been committed ... and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment XIV:

> No State shall ... deprive any person of life, liberty, or property, without due process of law ...

California statutory provisions involved in the case are lengthy. They are set forth in appendix C.

STATEMENT OF THE CASE

Procedural history

A jury convicted petitioner Rodney Bernard Barno of stalking (two counts), criminal threats (seven counts), felony vandalism (one count), misdemeanor vandalism (six counts) and misdemeanor telephone threats (two counts). Mr. Barno admitted he had suffered three prior adjudications in juvenile court that qualified as prior "strikes" under California's three strikes law. Two of the prior adjudications involved assault with a deadly weapon. The other involved discharging a firearm in a grossly negligent manner. Appendix A, pp. A-1, 2. The California Superior Court sentenced Mr. Barno under the three strikes law to a prison term of 50 years to life by imposing consecutive terms of 25 years to life for one count of stalking and one count of criminal threats. Appendix A, p. A-2.

Mr. Barno appealed and argued that California's "three strikes" law violates the Sixth and Fourteenth Amendments because it permits use of juvenile adjudications as prior "strikes" to increase the length of the prison term in the current case, even though facts underlying the juvenile adjudication were not established through procedures satisfying the jury trial guarantee.

Mr. Barno argued in the Court of Appeal that his trial counsel provided ineffective assistance when he advised Mr. Barno to admit the truth of the prior juvenile adjudications without first challenging them on federal constitutional grounds. Specifically, Mr. Barno argued:

> Trial counsel provided ineffective assistance under the Sixth and Fourteenth Amendments to the United States Constitution, as interpreted by the United States Supreme Court in *Strickland v. Washington* (1984) 466 U.S. 668, 695 [104 S.Ct. 2052, 80 L.Ed.2d 674] by advising appellant to admit the juvenile adjudications as prior "strikes" and by failing to argue that principles in the federal constitution forbid use of those adjudications to increase the length of appellant's sentence. [Appellant's opening brief on appeal, pp. 62-63].

In a supplemental opening brief, Mr. Barno argued that the constitutional question concerning proper use of the prior juvenile adjudications could be reviewed on appeal under two additional theories. In that supplemental brief, Mr. Barno addressed a claim by the California Attorney General that there

was no ineffective assistance of counsel because, "there was no valid basis for challenging the juvenile strike priors." Respondent's brief on appeal, pp. 52-53. The California Attorney General claimed it would have been futile for trial counsel to make the constitutional argument because the trial court would have followed California Court of Appeal opinions that hold principles in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) do not preclude use of prior juvenile adjudications as strikes. Respondent's brief on appeal, pp. 52-53. Mr. Barno contested that argument, saying:

> Assuming for the sake of argument that respondent is correct about appellant's claim of ineffective assistance of counsel, the argument [concerning use of juvenile priors as "strikes"] is cognizable on appeal in the absence of an objection below. An objection is not required when it would be futile under controlling precedent. "Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence." [*People v. Welch*, 5 Cal.4th 228, 851 P.2d 802, 808, 19 Cal.Rptr.2d 520, 526 (1993)]. Moreover, a reviewing court has discretion to consider issues that have not been formally preserved for review. [Citation omitted.] Since the purpose of the forfeiture doctrine is to encourage a defendant to bring errors to the trial court's attention so the court may avoid them [*People v. Marchand*, 98 Cal.App.4th 1056, 120 Cal.Rptr.2d 687, 690 (2000)], it

> would be inappropriate to invoke the forfeiture doctrine if the trial court would certainly have ruled against appellant based on controlling precedent.

Supplemental opening brief on appeal, pp. 5-6.

The California Court of Appeal acknowledged Mr. Barno's arguments that the issue should be considered on appeal and then decided the issue on the merits. The Court of Appeal opinion says, in pertinent part:

> Barno asserts that he was afforded ineffective assistance of counsel because his trial attorney did not object to the court's use of his prior juvenile adjudications as strikes. In a supplemental opening brief Barno directly challenges the court's use of his prior juvenile adjudications as strikes, claiming that the court erred in doing so. On both claims, Barno contends that *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), and *United States v. Tighe* (9th Cir. 2001) 266 F.3d 1187 (*Tighe*) compel the conclusion that the trial court's use of his prior juvenile adjudications as strikes violated his federal constitutional rights to due process and a jury trial. We reject this contention.

Appendix A, p. A-43. The Court of Appeal then fully discussed the merits of Mr. Barno's argument and ruled against him on the merits, relying upon California Court of Appeal opinions that had rejected similar arguments. Appendix A, pp. A-43 to A-45.

Mr. Barno filed a timely petition for review in the California Supreme Court in which he re-asserted his claim that use of prior juvenile adjudications as strikes violated the federal constitution. Petition for review, pp. 4-8. The petition for review was denied in an unreported order dated August 8, 2007. Appendix B, p. A-52.

The underlying facts

Mr. Barno suffered the three prior juvenile court adjudications on August 22, 1994, in a single juvenile court proceeding. Mr. Barno took that case to trial in juvenile court. A judge made all factual findings concerning guilt. California Record on Appeal, C.T. p. 199; 9 R.T. p. 928, 10 R.T. pp. 935-936.

Mr. Barno's prior juvenile adjudications stemmed from one incident involving two victims. Appendix A, p. A-40. In July 1994, two months before Mr. Barno's 18th birthday, he argued with two individuals, a 15-year-old female and a 19-year-old male, at his house. Mr. Barno told them to leave. He grabbed what appeared to be an AK-47 machine gun with a loaded clip. He pointed it at the female victim. The male victim grabbed the barrel and pushed it away. Mr. Barno then said, "[Y]ou don't think I won't shoot your fuckin' ass?" The victims started to leave. Mr. Barno followed them out of his house, keeping the gun pointed at them. Suddenly, both victims and several neighbors heard a gunshot. The victims then left the area. Appendix A, p. A-45.

In the current case, immediately after the jury returned verdicts of guilty on counts 1 through 18,

the court asked Mr. Barno's trial counsel, "...does he want to admit the three strike priors?"

Counsel replied, "Yes, we'll – is that correct, you admit that you suffered those three convictions? Mr. Barno was then advised that he had a right to have a jury decide the question. Mr. Barno gave up that right and admitted he suffered the prior adjudications. California Record on Appeal, 9 R.T. pp. 927-929. At no time did his trial counsel argue it would be unconstitutional to use the juvenile adjudications to increase the maximum sentence that could be imposed. The superior court used the three strikes law to impose a term of 50 years to life. California Record on Appeal, C.T. pp. 208, 275; 10 R.T. pp. 964-966.

The facts underlying Mr. Barno's current convictions have no meaningful bearing on the question presented for review in this Court. The facts can be briefly stated as follows. Mr. Barno broke up with a girlfriend after a short dating relationship. Appendix A, p. A-3. Thereafter he made many threats, primarily by telephone, to the young woman, her mother, the lawyer who helped the young woman obtain a restraining order, and some of the young woman's friends and neighbors. Mr. Barno also committed acts of vandalism against automobiles owned by some of those people. Appendix A, pp. A-3 to A-15.

REASONS FOR GRANTING THE PETITION

THE PRISON TERM OF 50 YEARS TO LIFE UNDER THE "THREE STRIKES" LAW VIOLATED MR. BARNO'S RIGHT TO A JURY TRIAL BECAUSE HIS PRIOR "STRIKES" WERE INCURRED IN A CONTESTED JUVENILE COURT TRIAL WHERE HE HAD NO RIGHT TO A JURY.

1. The sentencing court used Mr. Barno's prior juvenile adjudications to increase the maximum prison term that could be imposed.

California's three strikes law provides that any person convicted of a felony offense who has previously been convicted of two offenses defined as "serious" or "violent" felonies shall be imprisoned for a term of 25 years to life. Cal. Penal Code § 667(b) and (e)(2) and § 1170.12(a) and (c)(2). The three strikes law permits a prior juvenile court adjudication to be used as a "strike" if the defendant was at least 16 years old when that offense occurred, and the offense otherwise qualifies. Cal. Pen. Code §§ 667(d)(3). See text of California statutes in Appendix C.

In Mr. Barno's case the sentencing court used the three strikes law to impose the prison term of 50 years to life. Appendix A, pp. A-2, A-45. Had the three strikes law not been available for use in this case, the maximum possible prison term for the felony offenses would have been ten years. [1]

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[1] The maximum term for each count of conviction under California's Determinate Sentencing Law is: (1) Count 1, stalking, three years [Appendix A, p. A-1 and Cal. Pen. Code §§

2. The Sixth and Fourteenth Amendments require that, to use a prior adjudication to increase the maximum term in a subsequent case, the prior adjudication must have been established through procedures that satisfied the jury trial guarantee.

Constitutional principles interpreted in *Jones v. United States*, 526 U.S. 227 (1999) (*Jones*), *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (*Apprendi*), *Blakely v. Washington*, 542 U.S. 296 (2004) (*Blakely*), and *Cunningham v. California*, 549 U.S. 1169 (2007) (*Cunningham*), preclude use of juvenile court priors to increase the length of a subsequent adult court sentence because juvenile court does not

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18 and 646.9(a); (2) Count 2, stalking in violation of a restraining order, four years [Appendix A, p. A-1 and Cal. Pen. Code § 646.9(b)]; (3) Counts 3, 4, and 6-10, criminal threats, three years [Appendix A, pp. A-1 and A-2 and Cal. Pen. Code §§ 18 and 422]; Count 11, vandalism causing damage exceeding $400, three years [Appendix A p. A-2 and Cal. Pen. Code §§ 18 and 594(b)(1)]. The ten-year maximum prison term is calculated as follows: the upper term of four years for count 2, plus consecutive sentences of one-third the middle term [8 months] for each of the remaining nine felony offenses. Cal. Pen. Code §§ 1170(a)(3) and 1170.1(a). Note that the provisions of California Penal Code sections referenced in this footnote are found in appendix C to this petition.

Counts 5, 11-18 are misdemeanors. Each of the six misdemeanor vandalism offenses would carry a maximum term of one year in county [non-prison] custody. Appendix A, p. A-2 and Cal. Pen. Code §§ 594(b)(2)(A). Each of the two misdemeanor telephone threats offenses would carry a maximum of six months in county custody. Appendix A, p. A-2 and Cal. Pen. Code §§ 19 and 653m(a). Consecutive terms in county custody are rare in California.

permit trial by jury. *In re Myresheia W.*, 61 Cal.App. 4th 734, 72 Cal.Rptr.2d 65, 67-69 (1998) [no right to jury trial in California juvenile court]; *Jones, supra*, 526 U.S. at p. 249 ["a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees."].) Mr. Barno took his prior case to trial in juvenile court where a judge made all factual findings concerning the alleged offenses. California Record on Appeal, C.T. p. 199; 10 R.T. pp. 935-936.

In *Apprendi*, this Court held a jury -- not a judge -- must decide all facts used to determine the length of the maximum prison term that can be imposed. However, this Court allowed an exception for "prior convictions." *Apprendi, supra,* 542 U.S at pp. 486, 490. This is not a true exception, however, because facts underlying a prior criminal conviction were either decided by a jury, or could have been decided by a jury if the defendant so chose. The availability of a jury to decide factual questions in a prior adult court proceeding is an important reason why *Apprendi* made the exception that generally permits a judge in a subsequent case to determine whether the defendant suffered the prior conviction. *Apprendi, supra,* 542 U.S at pp. 488-490 and see *Jones, supra*, 526 U.S. at p. 249.

3. There is a split of authority on the question whether a prior juvenile adjudication can be used to increase the maximum prison term in a subsequent case in adult court.

There is currently a split of authority in the lower federal courts and in the state courts concerning whether *Jones*, *Apprendi* and their progeny pre-

clude use of juvenile priors to increase the length of a subsequent adult court sentence. In *United States v. Tighe,* 266 F.3d 1187 (9th Cir. 2001) (*Tighe*), a divided panel of the Ninth Circuit Court of Appeals held that prior juvenile adjudications are unavailable to enhance a sentence under the "Armed Career Criminal Act." 18 U.S.C. § 924(e). That statute mandates a minimum 15-year sentence for defendants who have three previous convictions for violent or serious drug convictions and are later found guilty of possessing a firearm. In *Tighe,* a majority of the Ninth Circuit panel ruled that a defendant's prior juvenile adjudication could not constitutionally qualify as a prior conviction under title 18 U.S.C. section 924(e), if the accused was not afforded the right during the prior adjudication to have the matter submitted to a jury and proved beyond a reasonable doubt. *Tighe, supra,* 266 F.3d at pp. 1193-1194.

The *Tighe* majority opinion explains that the "prior conviction" exception in *Apprendi* does not apply to juvenile adjudications because,

> Neither *Apprendi*, nor *Almendarez-Torres* - the case upon which *Apprendi* relied to create the "prior conviction" exception to its general rule - specifically addressed the unique issues that distinguish juvenile adjudications from adult convictions, such as the lack of a right to a jury trial in most juvenile adjudications.

Tighe, supra, 266 F.3d at p. 1193. The *Tighe* majority was correct. In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (*Almendarez-Torres*), this Court upheld a federal law allowing a judge to enhance a sentence based on prior convictions not al-

leged in the indictment. *Tighe, supra,* 266 F.3d at p. 1193. *Apprendi* explains that the *Almendarez-Torres* defendant,

> ...*admitted* the three earlier convictions for aggravated felonies—all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own—no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court.

Apprendi, supra, 530 U.S. at p. 488. Recognizing this difference, the *Apprendi* opinion explains,

> Both the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that 'fact' in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum statutory range.

Ibid. fn. omitted.

These procedural safeguard concerns were also raised in *Jones, supra,* 526 U.S. 227. This Court emphasized that the fact of a prior conviction was constitutionally distinct from other sentence enhancing facts. For that reason it was permissible to use prior convictions to increase the penalty for a subsequent offense without treating them as an element of the current offense. This Court explained,

> One basis for that possible constitutional distinctiveness is not hard to see: unlike virtu-

> ally any other consideration used to enlarge the possible penalty for an offense, ... a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.

Emphasis added, *Jones, supra,* 526 U.S. at p. 249.

Justice Brunetti dissented in *Tighe.* He said the majority's reasoning based upon the language in *Jones* represented "a quantum leap" in logic. In Justice Brunetti's view,

> ...the language in *Jones* stands for the basic proposition that Congress has the constitutional power to treat prior convictions as sentencing factors subject to a lesser standard of proof because the defendant presumably received all the process that was due when he was convicted of the predicate crime. For adults, this would indeed include the right to a jury trial. For juveniles, it does not. Extending *Jones*' logic to juvenile adjudications, when a juvenile receives all the process constitutionally due at the juvenile stage, there is no *constitutional* problem (on which *Apprendi* focused) in using that adjudication to support a later sentencing enhancement.

Tighe, supra, 266 F.3d at p. 1200. This dissenting view was adopted by the Eighth Circuit in *United States v. Smalley,* 294 F.3d 1030 (8th Cir. 2002), certiorari denied 537 U.S. 1114 (2003). *Smalley* was followed by the Third Circuit in *United States v. Jones,* 332 F.3d 688 (3rd Cir. 2003), certiorari denied 540 U.S. 1150 (2004) and by the Eleventh Circuit in

United States v. Burge, 407 F.3d 1183 (11th Cir. 2005), certiorari denied 546 U.S. 981 (2005).

A number of state court opinions, including several from California, have taken the same view as the *Tighe* dissent. *State v. Hitt,* 273 Kan. 224, 42 P.3d 732, 739 (2002), cert. denied 537 U.S. 968 (2002); *Ryle v. State,* 842 N.E.2d 320 (Ind. 2005), cert. denied ___ U.S. ___ [127 S.Ct. 90] (2006); *People v. Bowden,* 102 Cal.App.4th 387, 125 Cal.Rptr.2d 513 (2002); *People v. Smith,* 110 Cal.App.4th 1072, 1 Cal.Rptr.3d 901 (2003, Johnson, J. conc. & dis.); *People v. Lee,* 111 Cal.App.4th 1310, 4 Cal.Rptr.3d 642 (2003, Rushing, P.J. dissenting), cert. denied 542 U.S. 906 (2004); *People v. Superior Court (Andrades),* 113 Cal.App.4th 817, 7 Cal.Rptr.3d 74 (2003), cert. denied 543 U.S. 884 (2004).

But some state courts have taken the view that *Apprendi* bars the use of juvenile adjudications to enhance adult sentences over and above the otherwise statutorily set maximum. See, e.g., *State v. Brown,* 879 So.2d 1276, 1290 (La. 2004), cert. denied 543 U.S. 1177 (2005); *Pinkston v. State,* 836 N.E.2d 453, 460 (Ind.App. 2005); Commentators are nearly unanimous in that view.[2]

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[2] See Comments, *Juvenile Justice and the Punishment of Recidivists Under California's Three Strikes Law* (2002) 90 Cal. L. Rev. 1157; Recent Cases, *Constitutional Law – Right to Jury Trial – Eighth Circuit Holds An Adjudication of Juvenile Delinquency to Be a "Prior Conviction" for the Purpose of Sentence Enhancement at a Subsequent Criminal Proceeding—United States v. Smalley, 294 F.3d 1030 (8th Cir. 2002)* (2002) 116 Harv. L. Rev. 705; Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts* (2003) 38 Wake

4. Certiorari is needed to settle the conflicting decisions made in the lower courts on the question presented in this petition.

In Mr. Barno's case, the California Court of Appeal relied on prior decisions of the California Courts of Appeal, cited on page 14 of this petition, *supra*, to reject Mr. Barno's legal theory on the merits. The Court of Appeal opinion says:

> These cases have distinguished *Tighe*, noting that California's Three Strikes law, unlike the federal sentencing law at issue in

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Justice in Juvenile Courts (2003) 38 Wake Forest L. Rev. 1111; Comment, *California's Three Strikes Law – Should a Juvenile Adjudication Be a Ball or a Strike?* (1995) 32 San Diego L. Rev. 1297; Comment, *Prior 'Convictions' Under Apprendi: Why Juvenile Adjudications May Not Be Used to Increase An Offender's Sentence Exposure if They Have Not First Been Proven to a Jury Beyond a Reasonable Doubt* (2004) 87 Marq. L. Rev. 573; Murphy, *The Use of Prior Convictions after Apprendi* (2004) 37 U.C. Davis L. Rev. 973; Marrus, *"That Isn't Fair, Judge": The Costs of Using Prior Juvenile Delinquency Adjudications in Criminal Court Sentencing* (2004) 40 Hous. L. Rev 1323; Note, *Juvenile Strikes: Unconstitutional Under Apprendi and Blakely and Incompatible with the Rehabilitative Ideal* (2005) 15 So. Cal. L. Rev. & Women's Stud. 171; Notes, *Should Juvenile Adjudications Count as Prior Convictions For Apprendi Purposes?* (2004) 45 Wm. & Mary L. Rev. 1159; Note, *The Problem with Forgiving (But Not Entirely Forgetting) the Crimes of Our Nation's Youth: Exploring the Third Circuit's Unconstitutional Use of Nonjury Juvenile Adjudications in Armed Career Criminal Sentencing* (2005) 66 U. Pitt. L. Rev. 887.)

Only one law review article has been found favoring use of juvenile adjudications to enhance adult sentences. Notes & Comments, *Should Little Joey's Juvenile Adjudication Be Used Against Him When he Becomes Joe the Habitually Violent Felon?*, *supra*, 25 J. Juv. L. 45.

> *Tighe*, requires that a prior conviction, including a prior juvenile adjudication, be proved beyond a reasonable doubt, and provides for the right to a jury trial on the issue of whether a defendant has suffered a prior conviction. [Citation omitted.] These procedural safeguards satisfy the due process concerns expressed in *Apprendi*, *supra*, 530 U.S. 466. ¶ Based on these authorities, we also conclude that, "a prior juvenile adjudication may constitutionally be used as a 'strike' despite the fact that there is no right to a jury trial in juvenile proceedings."

Appendix A, p. A-39.

The California Court of Appeal opinion is wrong when it says California law complies with the federal constitution because it provides for the right to have a jury in the current proceeding determine whether the defendant suffered a prior conviction. That reasoning ignores the plain language in *Jones*, which says, "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones*, *supra*, 526 U.S. at p. 249. Had Mr. Barno requested in the current case that the alleged prior adjudications be tried to a jury, the issues presented to the jury for resolution would have been extremely narrow. A judge would have resolved questions concerning facts of the prior adjudications, based on court documents from the juvenile proceeding. If the judge found Mr. Barno was the person named in those records, the judge would have so instructed the jury. The jury would have simply been asked to decide

whether those documents were authentic and, if so, were sufficient to establish the convictions Mr. Barno suffered were the ones alleged. *People v. Kelii,* 21 Cal.4th 452, 458-459, 981 P.2d 518, 520-521; 87 Cal.Rptr.2d 674, 677-678. Thus, the jury in the current case could not satisfy the jury guarantee because it could not evaluate facts of the prior offenses like a jury would have done when the prior case was litigated.

This Court has not addressed the question whether use of juvenile priors as "strikes" violates federal constitutional principles established in *Jones* and *Apprendi.* Mr. Barno submits that this is an important question of constitutional law that needs to be addressed and resolved by this Court, given the split of authority that exists in the lower federal courts and in the state courts.

This Court has applied the constitutional principles set forth in *Jones* and *Apprendi* to a variety of sentencing issues, culminating recently in *Cunningham v. California, supra,* 549 U.S. 1169. *Cunningham* forbids judicial fact finding to establish the truth of facts used to justify imposition of the upper term of imprisonment under California's Determinate Sentencing Law. *Cunningham, supra,* 549 U.S. 1169 [127 S.Ct. at pp. 870-871. By analogy *Cunningham* supports Mr. Barno's assertion that his prior juvenile adjudications cannot be used as strikes. Just as the defendant in *Cunningham* was denied the right to have a jury determine the truth of facts used to impose the upper term of imprisonment, Mr. Barno had no right in juvenile court to have a jury determine the truth of facts used to make factual findings. The prior juvenile adjudica-

tions were then used in the current case to increase the penalty from a maximum of 10 years to a term of 50 years to life. At no time has Mr. Barno had an opportunity to have a jury decide whether facts underlying the juvenile adjudications were true. Under the rationale expressed in *Apprendi*, *Jones*, *Blakely* and *Cunningham*, this represents an unconstitutional denial of the jury trial right.

Mr. Barno asks this Court to grant certiorari so it can decide the important question of constitutional law that he presents for review.

CONCLUSION

The petition for writ of certiorari should be granted.

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE, STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RODNEY BERNARD BARNO, Defendant and Appellant.	D045992 Super. Ct. No. SCD177819

APPEAL from a judgment of the Superior Court of San Diego County, Frank A. Brown, Judge. Affirmed.

In November 2004 a jury convicted Rodney Bernard Barno (Barno) of stalking (Pen. Code,[3] § 646.9, subd. (a); count 1); stalking in violation of a restraining order (§ 646.9, subd. (b); count 2); seven counts of making criminal threats (§ 422; counts 3, 4, 6-10); vandalism causing damage exceeding $400 (§ 594,

[3] All further statutory references are to the Penal Code unless otherwise specified.

subd. (a)(b)(1); count 11); six counts of vandal-ism causing damage less than $400, a misdemeanor (§ 594, subd. (a)(b)(2)(A); counts 5, 11-16), and two counts of making harassing telephone calls, a misdemeanor (§ 653m, subd. (a)). Barno admitted he had suffered three prior strike juvenile adjudications, two for assault with a deadly weapon (§ 245, subd. (a)) and one for discharging a firearm in a grossly negligent manner (§ 246).

Barno was sentenced to a prison term of 50 years to life, consisting of 25 years to life on the count 1 stalking conviction and a consecutive 25 years to life on the count 6 criminal threat convictions. The court stayed the sentence on the counts 3 and 4 criminal threat convictions under section 654. The court imposed concurrent terms on the remaining criminal threat convictions (counts 2 & 7-10). The court gave Barno credit for time served on the misdemeanor vandalism and harassing phone call convictions in counts 5 and 12-18.

On appeal Barno asserts (1) the jury was improperly instructed on its use of evidence of his prior acts of domestic violence; (2) the court abused its discretion in admitting evidence of his past acts of domestic violence; (3) the court erred by allowing the People to prove the damage caused by his vandalism to a car with an invoice showing the cost of repair; (4) the court erred in not giving, sua sponte, a unanimity instruction on the facts supporting counts 6, 9 and 10; (5) there is insufficient evidence to support the criminal threat convictions in counts 3, 6 and 7; (6) the court erred by not instructing, sua sponte, on principles of accomplice liability; (7) the court erred in failing to instruct the jury that a prosecution wit-

ness was an accomplice as to count 11; (8) he was provided ineffective assistance of counsel because trial counsel failed to argue that the court could not use his prior juvenile adjudications as strikes; (9) the court abused its discretion in failing to strike his prior juvenile adjudications; and (10) the cumulative effect of the errors rendering the proceedings fundamentally unfair. In a supplemental opening brief Barno asserts that (1) the court should have also given a unanimity instruction on count 3, and (2) use of his prior juvenile adjudications as strikes violated the federal Constitution. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *People's Case*

1. *Stalking, criminal threats and vandalism targeting Daniell A. (counts 1-5)*

Barno and Daniell A. began dating at the end of January 2003. Daniell was then 19 years old. They dated for approximately one to two weeks. Daniell ended the relationship because Barno was getting too possessive and aggressive. Barno became very upset when she broke up with him.

That evening, Daniell's mother, Helen A., received harassing phone calls from Barno. Because she did not want any problems, Daniell called Barno and told him that she wanted to remain friends with him, believing it would allow her to ease out of their relationship. At first this seemed to work, but Barno continued to try to have a dating relationship with Daniell. Daniell decided to end the relationship completely.

Daniell left on a four-day vacation with her father, and she did not initiate any contact with Barno when she returned. While Daniell was gone, Barno called her mother, Helen, about three times a day. Barno asked about Daniell and wanted to know where she had gone. Helen assured Barno that Daniell was with family and that when she was ready she would call him.

After Daniell returned from her trip, her friend Josh Cardinal drove her to pick up her car that she had left parked at a friend's house. When she arrived, Barno was waiting for her in front of her car. Barno wanted to know why she had not called him. Daniell told him that she did not want anything to do with him. Barno asked her to return the shirts from his cousin's bar, where she was working, and informed her that she no longer had a job there. Barno was very upset. He also demanded to know why she was with Cardinal and wanted information about him.

Barno insisted that she return the work shirts immediately and followed her back to her house. At the house they began arguing again. Barno kept arguing and yelling at her. Daniell's neighbor, Robert Eliasson, came out and tried to intervene. Eliasson told Barno to leave and he did so.

After Barno left, Daniell went to work at her job at Islands Restaurant. After she arrived at work she started getting phone calls. Because she was not allowed to take phone calls at work unless it was an emergency, the calls were answered by other employees and the caller was told that Daniell could not come to the phone. Finally, the caller spoke to the manager and told her he needed to speak to Daniell

because it was a family emergency. The manager took Daniell to the back office where she could take the call. Barno was on the phone. He yelled at her and asked about Cardinal. Barno told Daniell that if she did not give him the information he wanted he was going to "fuck [Daniell] up and fuck up [her] car." The call upset Daniell and she was visibly anxious and nervous.

That evening Daniell drove her Honda Civic home from work and parked it outside her home. The next morning, she discovered that it had been vandalized. There were two large holes in the back window. There was a gash on the side window and damage to the door. Rocks had been thrown through the back window. Daniell reported the incident to police.

San Diego Police Officer John Jillard responded to the call. While he was investigating the incident, either Daniell or her mother Helen received a phone call from Barno. Officer Jillard took the phone and spoke to Barno. The officer asked Barno to come to the scene so he could take a statement. Barno stated that he would be there in five minutes with his lawyer. Officer Jillard waited for 30 minutes, but Barno never came.

After the vandalism incident, Daniell applied for a temporary restraining order against Barno. After she instituted those proceedings, Barno's threatening phone calls became more violent. Barno threatened to kill Daniell. Daniell received calls from February through April 2003. There were continu-ous calls to her mother's cell phone and at her home phone. Helen reported the calls to police as soon as

she received them. At times she could identify the caller as Barno, and at times she could not.

One night during this time period, Helen received 65 phone calls on her home phone. The caller identification on the phone showed that the incoming calls were from Barno's phone number. During this time period the calls would come at all hours of the day and night. Sometimes the calls were hangups, and other times they were threatening. The caller would tell Daniell that she "had fucked up, and that [she] was going to get what was coming to [her]." The calls were made by Barno and others. One of the callers was Lacy Kristofferson, who was dating Barno's younger brother, Chris Barno. In May 2003 Daniell received a call from Kristofferson, who stated, "They know you're behind everything that is going on, and they are coming after you when all these lawsuits are over." She stated, "You talked. You are going to get what you deserve."

Daniell hired an attorney, Lee Haugen, to assist her in getting a permanent restraining order against Barno. Her manager at Islands Restaurant, Patty Niemeyer, her neighbor, Elliasson, and her friend, Frances Laverty, all provided declarations in support of the restraining order. Barno was present at the hearing on the restraining order. On April 25, 2003, the court granted Daniell a three-year permanent restraining order against Barno. The order prohibited Barno from having any contact with Daniell, including following and harassing her, and was in effect from April 2003 through April 2006.

After Daniell obtained the permanent restraining order, her mother received a threat against Daniell from Barno. That threat, along with the others,

caused Daniell to be fearful. She was also fearful because Barno had told her about other incidents where he had vandalized other people's cars. He told her that when he was let go by Omni Express, a hiring company, he threw bricks on two occasions through the windows of the company. She had also seen Barno in possession of two large guns that he kept either behind his bedroom door or under his bed. She saw Barno load the guns on a couple of occasions.

During the time that she and Barno were dating, she witnessed him vandalize a car belonging to Danielle Dotta. Daniell had driven Barno and his cousin to Dotta's house. Barno directed her to park at the end of the street and leave the car running, but to turn off the lights and use the emergency brakes instead of the foot brakes so that no brake lights would go on. Barno and his cousin then got out of the car and broke the windows of Dotta's car with a hammer and a crowbar. After Dotta's car was vandalized, Daniell overheard him call her and threaten her. Barno told Dotta that "he knew girls that could come after her and get her without her knowing who they were; that he had a lot of friends that would do that for him."

Daniell saw Barno drive by her house on one occasion. On another, she was harassed by Barno's brother's girlfriend on the freeway. Barno followed her car on another occasion.

After the restraining order was issued, Daniell received a telephone call at home at 2:30 a.m. Because the caller's voice was distorted, she believed it was Barno and called the police. The caller threatened Daniell, described what she was wearing and said he

was going to get her. The call caused Daniell to become hysterical. She was crying, screaming and fearful.

Because of Barno's actions, Daniell was forced to change her lifestyle. She moved several times, between six and eight times in two years. She switched jobs several times, changed her phone number and became more cautious. She got a security dog and did not often do activities by herself.

On April 30, 2003, a search warrant was served on Barno's home. The police executing the search warrant overheard a conversation Barno had with his brother Chris. Chris stated, "This is fucking bullshit. I know it is that fucking [Daniell] who did this." Barno responded, "Don't worry. We will take care of her real good. She will get hers."

Later that day, Daniell received a threatening phone call from Barno. Barno told Daniell, "You'll get it, bitch." That same day Daniell's mother received a threatening phone call from Barno, who told her, "You fucking bitch, you're dead." The call terrified her.

About a week later Daniell's mother received another threatening call from Barno. Barno told her, "Tell Daniell she's dead."

Between February and May 2003, Helen noticed that Daniell's demeanor changed. She was often scared and would cry a lot. Sometimes, Helen would find Daniell curled up in a corner crying.

2. *Criminal threats to Matthew Ballester* (*counts 6 & 7*)

Matthew Ballester was Daniell's boyfriend. Ballester dated Daniell on and off for about six years.

Ballester had a 14-year old brother, Michael. Barno's phone records showed that on February 20, 2003, he made three calls to Ballester's home phone and one to his cell phone. On February 25, he made five calls to Ballester's home phone.

Ballester received threatening calls from Barno. In some calls Barno said things like, "he was coming to get me, watch my back, going to fuck me up." Ballester received five similar calls. On another occasion, he told Ballester, "Watch your back. I'm coming over."

Barno also spoke on the phone with Ballester's brother, Michael. Michael told Barno that Ballester could not come to the phone and Barno replied, "Tell your brother he's going to get fucked up." Barno called again soon after that call and stated, "So you think this is a joke? Well tell your brother to stay away from my girl. I'm coming over there tonight." Michael told Ballester about both calls, which upset him, and made him nervous.

Those calls were reported to police the same night. Ballester spoke to the police and told them that he was "very frightened for my safety and the safety of my family" because of what he had heard about Barno. Ballester changed his lifestyle, took different routes home, and stopped parking his car in his driveway because he was afraid for his car and his family. He took Barno's threats seriously.

3. *Criminal threats to Suzanne and Robert Eliasson (counts 8 and 9)*

Robert Eliasson and his mother, Suzanne Eliasson, lived near Daniell. As discussed, *ante*, Robert

Eliasson provided a declaration in support of Daniell's application for a restraining order.

Between 4:30 and 7:00 p.m. on July 28, 2003, Robert received disturbing phone calls. Barno's phone records showed that he made eight phone calls to the Eliasson home phone on that date, the next day two calls were made to that phone, and four calls were made to Suzanne's cell phone.

Robert testified that in one of the calls the caller said, "Well, how about if I wait for you and your mom some night outside your apartment or condo." Robert replied that he would defend himself. In response, the caller stated, "I'll come over and beat the shit out of you and your mother." In another call, he said, "I'll come over there and kill you as well." The caller told Robert that he knew where he lived, recited his address, and said, "I'll come over one night, I'll wait for you and your mother, and eventually I'll kill you."

Robert called the police and reported the calls. He took the calls seriously and went outside to check his car to make sure a bomb was not planted underneath it. Robert called his mother Suzanne and told her about the calls. He also gave her the caller's phone number that had appeared on his phone's caller ID. Suzanne called the number and a man who identified himself as "Bob" answered the call. He asked, "Is this Susan?" and began to use profane language. He said, "You bitch, you whore, you're dead." He told her he was going to kill both her and her son. This frightened Suzanne and she called the police and relayed what the caller had said.

4. *Criminal threats to Jessica G. (count 10)*

Jessica G. dated Barno in 2002. Barno was possessive and controlling. On one occasion when they were having problems Barno told Jessica that he was going to make her suffer slowly.

On October 7, 2002, Jessica was out with Brett, a friend, when she received a threatening phone call from Barno. Barno asked what she was doing. When she told him she was "hanging out" with Brett, Barno became angry and threatened to "fuck her up." The threat frightened her. Over the next two days she received about 10 more calls from Barno.

On October 7, 2002, Alfred G., Jessica's father, also received two phone calls from Barno. In the first call, Barno told Alfred that his daughter was involved in illegal activity. In the second call, Barno told him that he was going to "fuck up his daughter." Alfred called Jessica and told her to come home, which she did. Jessica told police about the calls. While the police were taking a report, she received two more calls from Barno. Jessica feared for her safety and believed Barno would carry out his threats.

By the time of trial Jessica had moved to San Luis Obispo, partly to get away from Barno. She was afraid of what Barno might do to her family. On one occasion, Barno stated to her, "You might not be in town, but your family is still here."

5. *Vandalism to Danielle Dotta's car (count 11)*

Sometime on the night of February 2, 2003, or the morning of February 3, 2003, Danielle Dotta's 1997 Honda Civic, which was parked in the driveway

of her house, was vandalized. All of the windows, with the exception of the front windshield, were completely shattered. She received a bill for $2,563 to fix her car. She paid the deductible, and her insurance company paid the balance of $2,228.

The day after the vandalism, Dotta received a threatening phone call from Barno. Barno was very angry and threatened to "get" Dotta if she implicated him or Daniell in the incident. He told her he could send someone and it could happen in the parking lot of her work.

Dotta told police that she had also received a phone call from Barno two days before he vandalized Daniell's car. Barno told Dotta that he was going to take pictures of Daniell's car to show to Dotta. Later, Dotta received another call from Barno who told her he had vandalized Daniell's car, that it was worse than Dotta's, and so was the vandalism to Daniell's "little friend's [car]." The "little friend" statement referred to Josh Cardinal.

Barno also told Frances Laverty that he had vandalized Dotta's car.

6. *Vandalism to Josh Cardinal's car (count 12)*

Josh Cardinal met Daniell through a mutual friend, Lacy Kristofferson, who was dating Barno's brother, Chris. In February 2003 he gave Daniell a ride to pick up her car that she had left parked at a friend's house. Barno pulled up behind Cardinal in a car as he was dropping Daniell off. Barno, who seemed upset, asked Cardinal what he was doing and whether he was Daniell's boyfriend. Cardinal waited until Daniell got in her car and then drove away.

That evening Cardinal received a call from a person who was upset, yelled and cursed at him. The caller asked Cardinal to meet him at the park and told him, "I'm going to beat you up." Cardinal hung up the phone.

On February 20, 2003, the same night as Daniell's car was vandalized, Cardinal's car was vandalized. The windows were smashed and a door was dented.

Later, Cardinal saw Barno on the street and stopped to talk to him. Barno offered him $500 to fix the damage to his car. Barno gave Cardinal his cell phone number, but Cardinal did not follow up.

7. *Vandalism to the Lavertys' vehicles* (*counts 13-16*)

In 2003 Frances Laverty was friends with Daniell and also knew Barno. She submitted a declaration in support of Daniell's application for a restraining order against Barno and appeared at the hearing. The Laverty family received a series of threatening phone calls, both before and after the hearing on the restraining order, referring to Frances Laverty's court appearance at that hearing. Jennifer Laverty, Frances's sister-in-law, received one of the calls. The caller threatened to come over and damage their property, warned that Frances should "watch her back," and stated that she "was in for hard times." The caller also stated, "I will kill you, and I'll destroy your property. . . . Your sister-in-law Frances should stay out of my business."

On May 1, 2003, shortly after the court issued a restraining order against Barno, three of the Lavertys' vehicles were vandalized. A week later, a

fourth car was vandalized. The windows were smashed on all four vehicles.

Barno's phone records showed one call to the Laverty home on April 23, 2003, one call on April 24, two calls on April 25, four calls on April 26 (the day after the restraining order was issued), and one call on May 1, 2003 (the day three of the Lavertys' vehicles were vandalized).

8. *Harassing phone calls to Lee Haugen and Norma Miller (counts 17 & 18)*

Haugen was Daniell's attorney who assisted her in obtaining a restraining order against Barno. Miller was Haugen's administrative assistant. In May 2003 Haugen told Barno's attorney, Vikas Bajaj, that Barno was violating the restraining order, that he needed to get his client under control, and that Barno should not try to threaten him. Later that day, Miller received a call. The caller told her, regarding Haugen, "You tell him to watch his back, watch his fucking back every fucking minute." When Miller asked who the caller was, he stated, "None of your fucking business, fucking bitch." The call frightened Miller. Police tape recorded Barno's voice and played it for Miller, who recognized the voice as the caller who had made the threats to her on May 7, 2003. Phone records confirmed that Barno made a phone call to Haugen's office at 3:03 p.m. on May 7, 2003.

9. *Prior uncharged acts of domestic violence*

Jasmin L. was 17 years old when she began dating Barno, who was 23 years old at the time. They dated on and off for a year and a half, until Jasmin

broke off the relationship in 2000. Barno was upset when she ended the relationship. He paged her about 50 times, drove by her house and called her at home. He threatened her and she reported the threats to police. On more than one occasion, Barno threatened to poison her horses, damage her house and kill her and her family.

On March 15, 2001, during a time Jasmin and Barno were not dating, they got into an argument. Jasmin was sitting in a car with a friend, Steve Behnke, when Barno ran up to the car yelling and screaming. Barno screamed at them, "I'm going to fuck you up and fuck her up." Barno had a lit cigarette in his hand. Barno then put the cigarette out on her face, which left a burn mark. When she and Barno were not getting along, Barno would be aggressive towards her, use bad language and threaten her. The threats made her very afraid.

B. *Defense Case*

Barno did not testify or offer any other evidence in his defense.

DISCUSSION

I. *PRIOR UNCHARGED ACTS OF DOMESTIC VIOLENCE*

Barno asserts that the court erred in instructing the jury under CALJIC No. 2.50.02, which permits the jury to consider, for limited purposes, the prior acts of domestic violence against Jasmin, claiming that none of the charged crimes involved domestic violence. In a related argument, Barno contends that the court abused its discretion under Evidence Code section 352 in admitting that evidence under Evi-

dence Code section 1109. We reject these contentions.

A. *Background*

In an in limine motion, the People sought to introduce uncharged acts of domestic violence committed against Barno's former girlfriend, Jasmin, described in more detail, *ante*. Defense counsel objected under Evidence Code section 352, claiming the evidence was more prejudicial than probative. The People responded that the incidents were relevant, admissible and not remote in time. The court, observing that Barno's conduct toward Jasmin was a "carbon-copy" of the charged conduct and, after weighing the evidence under Evidence Code section 352, ruled that the prior acts of domestic violence were relevant and admissible under Evidence Code section 1109. The court, in ruling the evidence was admissible, stated, "I think that the similarity of the uncharged acts to those that are charged in this case show a pattern of intimidation and threats on the part of [Barno] in this particular context, and I think the jury's entitled to know that."

The court instructed the jury under CALJIC No. 2.50.02, which provides in part:

> Evidence has been introduced for the purpose of showing that the defendant engaged in an offense involving domestic violence [on one or more occasions] other than that charged in the case. [¶] ['*Domestic violence*' *means abuse committed against an adult or a fully emancipated minor who* is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the defendant

has had a child or is having or *has had a dating or engagement relationship.*]

[¶] . . . [¶] *'Abuse' means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another.* [¶] If you find that the defendant committed a prior offense involving domestic violence, you may, but are not required to, infer that the defendant had a disposition to commit [another] [other] offense[s] involving domestic violence. If you find that the defendant had this disposition, you may, but are not required to, infer that [he] [she] was likely to commit and did commit the crime [or crimes] of which [he] [she] is accused. [¶] However, if you find by a preponderance of the evidence that the defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by itself to prove beyond a reasonable doubt that [he] [she] committed the charged offense[s]. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime. [[Unless you are otherwise instructed, y]ou must not consider this evidence for any other purpose.] (Italics added.)

B. *Applicable Authority*

Evidence Code section 1109, subdivision (a)(1) provides:

> Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, *evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to* [*Evidence Code*] *Section 352.* [4] (Italics added.)

Evidence Code section 1109, subdivision (d)(3) defines the term "domestic violence" as follows:

> As used in this section, [¶] '[d]omestic violence' has the meaning set forth in Section 13700 of the Penal Code. . . .

Section 13700, subdivision (b) provides in part:

> "*Domestic violence*" *means abuse committed against an adult* or a [fully emancipated] minor *who is a* spouse, former spouse, cohabitant, former cohabitant, or *person with whom the suspect* has had a child or is having or *has had a dating* or engagement *relationship.* For purposes of this subdivision, 'cohabitant' means two unrelated

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[4] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

> adult persons living together for a substantial period of time, resulting in some permanency of relationship. (Italics added.)

Section 13700, subdivision (a) defines "abuse" as "intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to him or herself, or another."

C. *Analysis*

1. *Instruction under CALJIC No. 2.50.02*

The criminal threats against Daniell (counts 3 & 4) and against Jessica (Count 10) were acts of domestic violence as defined in section 13700. They had both been in a dating relationship with Barno. He made threats to inflict bodily injury against both individuals. Moreover, section 422, under which Barno was charged, requires that the threat of bodily injury be "so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and *an immediate prospect of execution of the threat.*" (Italics added.) Similarly, section 13700, subdivision (a) requires that the threat must place the victim in "reasonable apprehension of *imminent* serious bodily injury to himself or herself, or another." (Italics added.)

Barno asserts that the element missing is that there is no evidence that the threats placed Daniell or Jessica in a position to believe the threats were "imminent," and contends that "imminent" and "immediate" do not have the same meaning. We reject this contention.

The definition of "imminent" is "likely to occur at any moment; impending. . . . threateningly; near at hand." (Random House Unabridged Dict. (2d ed. 1993) p. 957.) "Immediate" is defined as "occurring or accomplished without delay; instant. . . . of or pertaining to the present time or moment." (*Ibid.*) Thus, the definitions of the terms used in section 422, under which Barno was charged, and section 13700, subdivision (a), which defines abuse, are largely synonymous. In order to convict Barno of counts 3, 4 and 10, the jury had to find that the threats placed Daniell and Jessica in "immediate" fear the threats would be carried out. Accordingly, the threats would also have placed them in "imminent" fear they would be acted upon.

However, the problem we encounter with the instruction under CALJIC No. 2.50.2 is that there were several other charged crimes that did not involve domestic violence. Nevertheless, that instruction was not limited by the court to counts 3, 4 and 10. Rather, it states that if the jury found that Barno had the disposition to commit acts involving domestic violence, "you may, but you're not required to, infer that he was likely to commit and did commit *the crime or crimes of which he is accused.*" (Italics added.) Thus, the jury could have understood the instruction to allow them to infer from his prior act of domestic violence that he was likely to commit some or all of the charged offenses, even those not involving domestic violence. The court should have instructed the jury that if it found Barno had the disposition to commit acts involving domestic violence, "you may, but are not required to, infer that he was likely to commit and did commit *counts 3, 4*

and 10." Barno contends that this error by the court requires a reversal of the other felony counts not involving domestic violence (counts 1, 2 & 6-9).

However, any error by the court in using CALJIC No. 2.50.02 without limiting its application to counts 3, 4 and 10 does not require a reversal. First, defense counsel admitted that Barno committed the acts that formed the basis for the other felony charges, but argued that they only amounted to at most misdemeanor conduct. CALJIC No. 2.50.02 did not tell the jury, and the prosecutor in closing argument in no way argued, that the prior domestic violence evidence tended to prove Barno was guilty of felony, as opposed to misdemeanor conduct. Additionally, the prosecutor's argument concerning the prior domestic violence incident involving Jasmin L. consisted of less than two pages of a closing argument that totaled 30 pages. Finally, the evidence overwhelmingly supported the jury's verdict on all charged offenses. Thus, it was not reasonably likely that, but for the court's error in instructing the jury under CALJIC No. 2.50.02, Barno would have received a more favorable result at trial. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

2. *Evaluation of prior acts under Evidence Code section 352*

Barno next contends that the court erred in admitting evidence of past incidents of domestic violence because the evidence was highly inflammatory and its probative value was outweighed by its prejudicial effect. We reject this contention.

A trial court has broad discretion in determining whether to admit or exclude evidence objected to

on the basis of Evidence Code section 352, and rulings under this section will not be overturned absent an abuse of that discretion. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1170.) "[T]he term judicial discretion 'implies absence of arbitrary determination, capricious disposition or whimsical thinking.' [Citation.]" (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) "[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered." (*Ibid.*)

"The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual *and which has very little effect on the issues.* In applying [Evidence Code] section 352, "prejudicial" is not synonymous with "damaging."' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638, italics added.)

Relevant factors in determining the prejudice resulting from admission of prior acts of domestic violence include whether the prior acts of domestic violence were more inflammatory than the charged conduct, the possibility the jury might confuse the prior acts with the charged acts, how recent the prior acts were, and whether the defendant had already been convicted and punished for the prior offense. (See *People v. Poplar* (1999) 70 Cal.App.4th 1129,

1139; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1315.)

Applying these factors to the instant case, the court did not abuse its discretion in admitting the prior instances of domestic violence involving Jasmin. Contrary to Barno's assertion, the prior incidents of domestic violence were no more egregious than the charged offenses, and posed no danger of confusing the jury. The events were recent in time and remarkably similar to the charged conduct. They involved abusive and threatening conduct after Jasmin ended her relationship with him. Barno made repeated threatening phone calls to her, used abusive and threatening language and threatened bodily harm. This conduct mirrors the charged conduct in this case and showed a pattern of Barno's threats to and intimidation of women he dated. The incident occurred only two years prior to the threats and harassment directed at Daniell. Although one prior incident involved actual physical violence (burning Jasmin with a cigarette), it was not so much more egregious that its prejudicial impact outweighed the highly probative nature of the evidence. Jasmin's description of Barno's actions was no more inflammatory than the testimony of Daniell or Jessica.

The most serious "prejudice" this evidence caused Barno was the fact it damaged his defense. However, as stated, *ante*, "prejudicial" is not synonymous with "damaging." (*People v. Karis, supra,* 46 Cal.3d at p. 638.)

Finally, Barno's claim that his due process rights were violated by admission of evidence of prior uncharged acts is unavailing. The California Su-

preme Court rejected such a claim in *People v. Falsetta* (1999) 21 Cal.4th 903, 917.

II. *ADMISSION OF INVOICE REGARDING COST OF REPAIR TO DOTTA'S VEHICLE*

Barno asserts that the court erred in admitting the repair bill substantiating the damages to Dotta's car. Specifically, Barno asserts that the repair bill was inadmissible hearsay that lacked foundation and that its admission violated his right to confront and cross-examine witnesses. We reject these contentions.

A. *Background*

On direct examination, Dotta testified concerning the repairs to her vehicle following the vandalism by Barno. When asked whether she recalled how much the repairs cost, defense counsel objected on hearsay grounds. The court overruled this objection.

Thereafter, the court heard further argument on the issue outside the presence of the jury. Defense counsel argued that Dotta had no personal knowledge of the cost of repair, and her testimony in this regard was therefore hearsay. The prosecutor responded that she had a bill from the Saturn dealership for the repair work, which was paid by the insurance company. Defense counsel argued that because the bill had not been prepared by Dotta, it had to be authenticated by someone from the Saturn dealership who prepared the bill. The court overruled the objection but cautioned that, out of an abundance of caution, the prosecutor "may want to have somebody come in from the Saturn Dealership

from their records and say: Yeah, that's what it cost."

Direct examination of Dotta resumed. She identified a copy of the bill she received for the repair work done on her car. She stated that the bill was for $2,563. Dotta stated that she paid her deductible and her insurance company paid the rest. Photographs showing damage to her vehicle and the repair bill were admitted into evidence, over the objection of defense counsel. Defense counsel renewed his objection to the repair bill, arguing again that the document was hearsay and also that he was denied the right to cross-examine the individual that prepared it.

B. *Analysis*

Evidence Code section 1200, subdivision (b) states that hearsay evidence is inadmissible except as provided by law, thereby recognizing exceptions created by case law, as well as statute. (*Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33 (*P.G.&E.*) The *P.G.&E.* case created what is known as the "corroborative evidence" exception to the hearsay rule for admission of business records that would ordinarily be considered hearsay. (Jefferson, Cal. Evidence Benchbook (3d ed. 2007) Hearsay Rule, § 1.18, p. 14 & § 1.24, p. 18.)

P.G.&E. addressed the admissibility of invoices, bills and receipts to prove the amount of damages the plaintiffs sustained. The Supreme Court found the documents to be hearsay and thus unusable as proof of liability, payment for the repairs or the reasonableness of the charges. (*P.G.&E., supra,* 69 Cal.2d at pp. 42- 43.) In doing so, the high court

noted, "If, however a party testifies that he incurred or discharged a liability for repairs, any of these documents may be admitted for the limited purpose of corroborating his testimony." (*Id.* at p. 43.) There was testimony in the record that the invoices had been paid, so that the invoices could be admitted for the limited purpose of corroborating that testimony. (*Ibid.*)

California courts have invoked this hearsay exception to sustain the admission of invoices (1) from a packing house after the manager of the cattle company testified to receiving them and arranging for payment (*Imperial Cattle Co. v. Imperial Irrigation Dist.* (1985) 167 Cal.App.3d 263, 272, disapproved on other grounds in *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432, 443-444); (2) representing dental bills, where the plaintiff/patient testified as to the services received, his receipt of the bill and his payment (*McAllister v. George* (1977) 73 Cal.App.3d 258, 263); and (3) constituting doctor bills where the plaintiff/patients first identified each bill, testified as to what each charge was for and the amount of each which had been paid. (*Rodgers v. Kemper Constr. Co.* (1975) 50 Cal.App.3d 608, 626.)

The repair bill here also fell within the corroborative evidence exception to the hearsay rule. Dotta testified that she received the bill. She also testified to the amount of the bill and stated that she paid the deductible and that her insurance company paid the rest.

Barno asserts that the repair bill does not fall within the corroborative evidence exception because Dotta only paid the deductible, and there was no evidence from the insurance company that it paid

the remainder. However, Dotta testified on direct examination not merely that she submitted the repair bill to her insurance company for payment, but that the insurance company *paid* the bill. Defense counsel did not cross-examine her as to the basis for her knowledge the insurance company paid the bill, so her testimony constitutes uncontradicted evidence of payment.

Barno also asserts that the court, in allowing the repair bill into evidence, violated his constitutional right to confront witnesses, citing the United State Supreme Court's decision in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).

In *Crawford,* the United States Supreme Court held that testimonial evidence is admissible only when the proponent establishes unavailability and a prior opportunity for cross-examination. (*Crawford, supra,* 541 U.S. at p. 68.) While the court did not define the term "testimonial," the court noted that testimonial evidence at least includes prior testimony made under oath and statements made during a police interrogation. (*Ibid.*)

Courts have held that certain documentary evidence does not constitute testimonial hearsay and, therefore, its admission into evidence does not implicate the confrontation clause. (See, e.g., *People v. Saffold* (2005) 127 Cal.App.4th 979, 984 [proof of service]; *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1413 [criminalist's laboratory report].) "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . ." (*Crawford, supra,* 541 U.S. at p. 68.)

In *People v. Taulton* (2005) 129 Cal.App.4th 1218 (*Taulton*), a Court of Appeal held that certified prison records also fall within the category of nontestimonial hearsay evidence. In determining whether evidence is testimonial under *Crawford*, the court held that the appropriate approach is to focus on the purpose for which the statement was made or recorded. (*Taulton, supra,* 129 Cal.App.4th at pp. 1223-1224.)

The court in *Taulton* noted that the Supreme Court specifically identified business records as nontestimonial evidence. (*Taulton, supra,* 129 Cal.App.4th at p. 1224, citing *Crawford, supra,* 541 U.S. at p. 56.) "Such records are prepared for many purposes but not to provide evidence in a potential criminal trial or to determine whether criminal charges should issue. One of the requirements for the admissibility of business records is that '[t]he writing was made in the regular course of business . . . .' (Evid. Code, § 1271, subd. (a).)" (*Taulton, supra,* 129 Cal.App.4th at p. 1224.) Because business records are not prepared for the purpose of being used as evidence at trial, they are not testimonial under *Crawford.* (*Taulton, supra,* at p. 1224.)

Similarly in this case, the repair bill was a business record and therefore not considered testimonial under *Crawford.* Thus, admission of the repair bill did not violate Barno's constitutional right to confront witnesses.

III. *FAILURE TO GIVE UNANIMITY INSTRUCTION ON COUNTS 3, 6, 9 AND 10*

Barno asserts the court erred by failing to instruct the jury sua sponte under CALJIC No. 17.01,

known as the "unanimity" instruction, as to the charges of making a criminal threat against Ballester (count 6), Eliasson (count 9) and Jessica (count 10). Barno contends that because there was evidence of several statements he made to these individuals that the jury could have relied on to find against him on these counts, and the People did not identify a particular statement it was relying on, the court was required to instruct the jury they must unanimously agree that a particular threat supported the conviction.[5] We reject this contention.

The principles governing a trial court's duty to instruct a jury sua sponte were explained in *People v. Eilers* (1991) 231 Cal.App.3d 288, 292: "'The trial court functions . . . as the jury's guide to the law. This role requires that the court fully instruct the jury on the law applicable to each particular case.' [Citation.] 'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence.' [Citation.]"

"[T]he requirement of jury unanimity in criminal cases is of constitutional origin." (*People v. Mickle* (1991) 54 Cal.3d 140, 178, citing Cal. Const., art. I, § 16 & *People v. Jones* (1990) 51 Cal.3d 294, 321.) As this court explained in *People v. Muniz* (1989) 213 Cal.App.3d 1508, 1517, "[i]t is well established that the entire jury must agree upon the commission of the same act in order to convict a defendant of the charged offense. [Citation.]" In *Muniz*, we further

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[5] Originally, Barno asserted that a unanimity instruction was required only for counts 6, 9 and 10. However, in a supplemental opening brief he argued that such an instruction should also have been given as to count 3.

explained that "it also is well established that a trial court is not obligated to give an instruction—either requested or sua sponte—if the evidence presented at trial is such as to preclude a reasonable jury from finding the instruction is applicable. [Citation.] 'A unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged.' [Citation.] In other words, '[i]f under the evidence presented such disagreement is not reasonably possible, the instruction is unnecessary.' [Citations.]" (*Id.* at pp. 1517-1518.)

"When the evidence tends to show a larger number of distinct violations of the charged crime than have been charged *and the prosecution has not elected a specific criminal act or event upon which it will rely for each allegation*, the court must instruct the jury on the need for unanimous agreement on the distinct criminal act or event supporting each charge. [Citations.]" (*People v. Avina* (1993) 14 Cal.App.4th 1303, 1309, italics added.)

Moreover, no unanimity instruction is required when the crime is a continuing one, i.e., while the crime may involve the doing of individual acts the conduct is essentially indivisible in a real or evidentiary sense. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199; *People v. Sanchez* (2001) 94 Cal.App.4th at p. 631.) "[N]o unanimity instruction is required when the acts alleged are so closely connected as to form part of one continuing transaction or course of criminal conduct. 'The "continuous conduct" rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between

them.' [Citations.]" (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 275.)

We address Barno's unanimity argument separately as to each count identified.

A. *Count 3 (April 30, 2003 Threat to Daniell)*

Count 3 involved a criminal threat made to Daniell on April 30, 2003. Barno asserts that because there was evidence of two phone calls on April 30, 2003, in which he made threatening comments to both Daniell and her mother Helen, and the prosecutor failed to specify which of the two calls constituted the criminal threat for count 3, the court was required to give a unanimity instruction. This contention is unavailing.

In closing argument, the prosecutor clearly specified that the criminal threat that supported count 3 was the statement he made directly to Daniell on April 30, 2003, "You'll get it, bitch." No mention is made of the threat to Daniell's mother.

Barno points to a statement later in closing argument where the prosecutor also mentioned the threat to Daniell's mother. However, the prosecutor only referenced that threat in discussing the circumstances surrounding the threat to Daniell that made it "unconditional, immediate and specific," one element of the crime of making a criminal threat. In this regard, the prosccutor stated:

> The fourth element has to do with the circumstances demonstrating that the threat is unconditional, immediate and specific. And what the instructions tell us is that we look to the circumstances and the relationship between the threatener [*sic*] and the

> threatened person. It says the threat on its face and under the circumstances in which it was made was so unequivocal, unconditional, immediate and specific so as to convey to that person a gravity of purpose. [¶] So we look to the circumstances and to the context between the two parties. Did the victim understand what was meant by the threatening statement? Let's look at some of the circumstances surrounding these threats. [¶] *On April 30 Daniell was threatened. Her mom was threatened the same day,* and Detective Reno called to tell them, "Look, a search warrant just happened. I wanted to let you know because there might be retaliation. (Italics added.)

From this discussion it is clear that the prosecutor was relying on the threat to Daniell to support count 3 and merely discussed the threat to her mother to show the surrounding circumstances and context in which it was made. No unanimity instruction was necessary on count 3.

B. *Count 6 (Threat to Matthew Ballester)*

The information alleged that between February 20, 2003 and February 25, 2003, Barno made criminal threats against Ballester. Barno asserts that because the evidence showed several threats to Ballester, and the prosecutor did not elect one act as the criminal threat that supported count 6, the court erred in failing to sua sponte give the jury a unanimity instruction.

In closing argument, the prosecutor, as with count 3, did direct the jury to a particular threat

that supported this count: "What I've done is just to go through the counts that charge this section with the specific threats. Count 3, 'You'll get it, bitch.' [¶] Count 4, 'Tell Daniell she's fucking dead.' [¶] Count 6, *'I'm going to fuck you up,' followed by his address.*" (Italics added.)

Barno asserts that the prosecutor was combining two different threats as the statement regarding Ballester's address came in a different telephone call than the "I'm going to fuck you up" statement. It is true, as detailed, *ante*, that the statement regarding Ballester's address did come in a different telephone call than that statement. However, it is clear that the *threat* the prosecutor was focusing on was made clear to the jury. The prosecutor was either referencing the address statement to show the surrounding circumstances of the threat or was simply mistaken in stating that it was made in the same telephone call as the threat. Regardless, merely reciting Ballester's address was not a threat in and of itself, and it is not reasonably likely that the jury was confused as to which threat the prosecutor was relying on to support count 6.

Further, to the extent that the prosecutor's election of a specific threat was not clear enough, any error was harmless. The sole defense to the criminal threat counts was that Barno's conduct amounted to only misdemeanor conduct of making annoying or harassing phone calls under section 653, subdivision (m). Where a defendant offers a unitary defense to all charges, and the jury rejects that defense, the failure to give a unanimity instruction is harmless error. (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 185-187.)

C. *Count 9 (Criminal Threat Against Eliasson)*

Under count 9, Barno was charged with making a criminal threat against Robert Eliasson on July 28, 2003. As with count 6, Barno asserts that because he was alleged to have made several separate threats against Eliasson on the afternoon of July 28, 2003, the court erred in failing to give a unanimity instruction on count 6.

Contrary to Barno's argument, the prosecutor did select a specific threat as against Robert Eliasson: "Count [9] to Robert Eliasson, 'How about if I come over there and beat the shit out of you and your mother? How about if I come over there and kill you and your mom?'"

Barno complains that the two statements were threats made in different phone calls, and therefore the prosecutor did not make an election between threats. However, the prosecutor later clarified that she was focusing only on the death threat in support of count 9: "Robert Eliasson got a very specific death threat. 'How about if I come over there and kill you? And here's your address in case you think I can't do it.'" No unanimity instruction was required as to count 9.

D. *Count 10 (Criminal Threat Against Jessica G.)*

Count 10 alleged that between October 7 and 10, 2002, Barno made a criminal threat against Jessica G. Barno again asserts that because there was evidence presented as to several threats, and the prosecutor did not elect a specific threat that supported this count, the court was required to give a unanimity instruction. We reject this contention.

In closing arguments the prosecutor made clear which threat she was relying on to support count 10: "In count 10 to Jessica [G.] through her father Alfred [G.], 'I'm going to fuck up your daughter.'" Later, the prosecutor again specified the threat that supported count 10: "[To] Jessica [G.] [he] again communicated a threat through a family member: 'I'm going to fuck up your daughter.'" There was no unanimity instruction required for count 10.

IV. *EVIDENCE SUPPORTING CRIMINAL THREAT CONVICTIONS ON COUNTS 3, 6 AND 7*

Barno asserts the evidence is insufficient to support his conviction for making the count 3 criminal threat against Daniell and the count 6 and 7 criminal threats against Ballester. This contention is unavailing.

A. *Standard of Review*

"In assessing a claim of insufficiency of evidence, [we review] . . . the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — that is, evidence that is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

B. *Elements Necessary To Prove Criminal Threat Under Section 422*

Section 422 provides in part:

> *Any person who willfully threatens to commit a crime which will result in death or*

great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, *which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety* or for his or her immediate family's safety, shall be punished by . . . imprisonment in the state prison. (Italics added.)

Thus, in order to prove a violation of section 422 the prosecution must establish the following elements: "(1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the

> threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety, and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances. (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

We address the evidence supporting counts 3, 6 and 7 in order.

C. *Analysis*

1. *Count 3 (criminal threat against Daniell)*

Count 3 alleged that on April 30, 2003, appellant made a criminal threat against Daniell. Barno asserts that the evidence is insufficient on that count based upon Daniell's mother's equivocal testimony concerning a phone call she received from Barno on that date.

Her mother, Helen, testified on direct examination that on April 30, 2003, Barno, in a telephone call, threatened to kill both her and her daughter. The caller stated, "You fucking bitch, you're dead. You and Daniell are dead." However, on cross-examination, Helen admitted that she was unsure whether the caller referred to her daughter. Moreover, when she made a report to police shortly after the incident, she did not tell them that her daughter was mentioned in the threat. She told the officer that Barno stated, "You're dead. Watch your back, bitch." She later told another officer that Barno had stated, "You're dead, bitch. You better watch your back."

However, Barno ignores the fact that count 3 was not based upon the phone call to Helen, but one to Daniell's cell phone on that same date. On April 30, 2003, she received a phone call from Barno, who stated, "You'll get it, bitch." In arguing count 3 to the jury, the prosecutor relied upon that threat, not the phone call to Helen. In fact, in his reply brief Barno concedes that the call to Daniell supported count 3 and that there is substantial evidence to support the count 3 conviction based upon that phone call. Substantial evidence supports the conviction for the count 3 criminal threat made against Daniell.

2. *Counts 6 and 7 (criminal threats against Ballester)*

Barno asserts that there is no substantial evidence to support elements 1, 3 and 4 of section 422 as to the count 6 and 7 criminal threats made against Ballester. We reject this contention.

The evidence demonstrates that the threats by Barno, made directly and through Ballester's brother Michael, were threats "to commit a crime that would result in death or great bodily injury." Directly to Ballester, Barno stated that "he was coming to get him," told him to "watch his back", and that he was going to "fuck him up." Through his brother Michael, he again threatened to "fuck him up." The only reasonable interpretation of these threats was that Barno intended to cause great bodily injury to Ballester.

Further, Barno's threats were so "unequivocal, unconditional, immediate and specific as to convey to the person threatened a gravity of purpose and an

immediate prospect of execution of the threat." The fact that Barno recited Ballester's address to him in one call conveyed to Ballester that the threat was immediate and could be carried out. After Barno told Ballester's brother Michael that he was going to "fuck up" his brother, he called back and said, "So you think this is a joke?", and stated that he was "coming over there tonight." This evidence amply supports element 3 of section 422.

Moreover, the evidence showed that the threats caused Ballester to be in sustained fear for his safety and that of his family. Section 422 does not define "sustained fear." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.) However, the California Supreme Court has interpreted the term to mean "a period of time that extends beyond what is momentary, fleeting, or transitory." (*Ibid.*) Ballester testified that he took Barno's threats seriously. As a result of the threats, he took different routes home, paid more attention to what he was doing, and did not park his truck in the driveway. He was worried for himself and his family. He told police he was "very frightened for [his] safety and the safety of [his] family." His family took security precautions including closing their windows at night and placing a chain lock on the door. This evidence was sufficient to satisfy element 3, as Ballester's fear was for a period of time that was more than "momentary, fleeting, and transitory." Substantial evidence supports the count 6 and 7 criminal threat convictions.

V. *AIDING AND ABETTING INSTRUCTIONS*

Barno asserts that the court erred by not instructing the jury on aiding and abetting liability be-

cause, as to the stalking charges in counts 1 and 2, there was evidence that he did not make all of the threatening phone calls to Daniell and her mother, Helen. Barno asserts that the evidence suggests that an unidentified female made some of the calls, and that Helen testified that she received calls from male individuals that she could not identify. Barno contends that because he "was prosecuted, at least in part, for criminal acts perpetrated by other people, the trial court committed error by failing to instruct on principles of aiding and abetting.

However, as the People point out in their respondent's brief, there is no evidence in the record that Barno was prosecuted on an aiding and abetting theory as to counts 1 and 2. Rather, the record is clear that the People based their case for these counts on Barno's actions, not the actions of others. Indeed, as noted, *ante*, defense counsel at trial admitted Barno committed these acts, but argued they only warranted misdemeanor, not felony, convictions. The court did not err in failing to instruct on aiding and abetting.

VI. *ACCOMPLICE INSTRUCTIONS*

Barno asserts that Daniell was an accomplice, as a matter of law, to the vandalism committed by Barno against Dotta's vehicle because Daniell drove him to tl crime scene. Because of this, Barno asserts the court erred by failing to instruct the jury on the law pertaining to accomplices, including the fact that the testimor of a witness who is also an accomplice should be viewe with caution and must be corroborated. This contentic is unavailing.

An "accomplice" is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given," that is, one who is considered a "principal" in the offense. (*People v. Horton* (1995) 11 Cal.4th 1068, 1113-1114.) A "principal" is one who is "concerned in the commission of a crime [regardless of] whether [he or she] . . . directly commit[s] the act constituting the offense, or aid[s] and abet[s] in its commission." (§ 31.) One is liable as an aider and abettor if he or she acts with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90-91; *People v. Marshall* (1997) 15 Cal.4th 1, 40.)

Where the evidence at trial is sufficient to support a conclusion that a witness who implicates the defendant was an accomplice, the court is required to instruct the jury, sua sponte, to determine whether the witness was an accomplice. (*People v. Warren* (1940) 16 Cal.2d 103, 106; *People v. Frye* (1998) 18 Cal.4th 894, 965.) If, however, the facts regarding the witness's criminal culpability are "clear and undisputed" (*People v. Williams* (1997) 16 Cal.4th 635, 679), the court must instruct the jury that the witness was an accomplice as a matter of law. (*People v. Zapien* (1993) 4 Cal.4th 929, 982.) In either situation, the court must also instruct the jury that the accomplice's testimony implicating the defendant must be corroborated. (§ 1111.)

Here, the evidence does not support a finding that Daniell was an accomplice to Barno when he vandalized Dotta's vehicle. The only evidence on this issue was that Daniell drove Barno to the scene and obeyed his commands to park at the end of the

street, leave the engine running, and turn the lights off.

This evidence is insufficient to support a theory that Daniell was Barno's accomplice. Whether an individual is an accomplice "depends on whether he promotes, encourages, or assists the perpetrator's . . . criminal purpose." (*People v. Sully* (1991) 53 Cal.3d 1195, 1227.) "It is not sufficient that he merely gives assistance with knowledge of the perpetrator's criminal purpose." (*Ibid.*) Moreover, mere presence at the scene of a crime or a failure to prevent a crime is insufficient to prove accomplice liability. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 530.)

In this case, the fact that Daniell drove Barno to the site of his vandalism and waited while he was committing the crime was insufficient evidence to require accomplice instructions as to Daniell, much less that she was an accomplice *as a matter of law.*

Moreover, the erroneous omission of accomplice instructions is deemed harmless where there is sufficient evidence corroborating the witness's testimony. (*People v. Arias* (1996) 13 Cal.4th 92, 143.) Such corroborative evidence need not corroborate every fact to which the witness testified. It is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth. (*People v. Williams, supra,* 16 Cal.4th at p. 679.)

Here, Daniell's testimony concerning the vandalism to Dotta's car was corroborated both by Dotta's testimony and Barno's statements to her and another individual. After discovering her car had been vandalized, Dotta received a phone call from Barno.

He warned her not to implicate him in the vandalism. Later, he called her and told her that he had vandalized Daniell's and Cardinal's cars and bragged that he had done greater damage to those cars than to hers. Barno also told Laverty that he had vandalized Dotta's car. Thus, Daniell's testimony was sufficiently corroborated by other witnesses, and Barno's own admissions to them, and any erroneous failure to give accomplice instructions as to Daniell did not result in prejudice.

VII. *RIGHT TO A JURY TRIAL ON PRIOR JUVENILE ADJUDICIATIONS*

Barno asserts that he was afforded ineffective assistance of counsel because his trial attorney did not object to the court's use of his prior juvenile adjudications as strikes. In a supplemental opening brief Barno directly challenges the court's use of his prior juvenile adjudications as strikes, claiming that the court erred in doing so. On both claims, Barno contends that *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), and *United States v. Tighe* (9th Cir. 2001) 266 F.3d 1187 (*Tighe*) compel the conclusion that the trial court's use of his prior juvenile adjudications as strikes violated his federal constitutional rights to due process and a jury trial. We reject this contention.

In *Apprendi*, the United States Supreme Court held that the due process clause of the Fourteenth Amendment requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." (*Apprendi, supra*, 530 U.S. at

p. 490.) In *Tighe,* the Ninth Circuit held that, under *Apprendi,* a defendant's prior juvenile adjudication could not constitutionally qualify as a prior conviction under title 18 United States Code section 924(e), a federal sentencing statute for repeat offenders, if that adjudication did not accord a defendant the right in that adjudication to have the matter submitted to a jury and proved beyond a reasonable doubt. (*Tighe, supra,* 266 F.3d at pp. 1193-1194.)

Following the Ninth Circuit's decision in *Tighe,* several decisions of the California Court of Appeal have held that it is constitutionally permissible to use a defendant's prior juvenile adjudication as a strike for sentencing purposes. (See *People v. Superior Court (Andrades)* (2003) 113 Cal.App.4th 817, 830-834; *People v. Lee* (2003) 111 Cal.App.4th 1310, 1312-1316; *People v. Smith* (2003) 110 Cal.App.4th 1072, 1075-1079; *In re Travis W.* (2003) 107 Cal.App.4th 368, 378; *People v. Bowden* (2002) 102 Cal.App.4th 387, 390-394.) These cases have distinguished *Tighe,* noting that California's Three Strikes law, unlike the federal sentencing law at issue in *Tighe,* requires that a prior conviction, including a prior juvenile adjudication, be proved beyond a reasonable doubt, and provides for the right to a jury trial on the issue of whether a defendant has suffered a prior conviction. (*Andrades, supra,* 113 Cal.App.4th at pp. 833-834.) These procedural safeguards satisfy the due process concerns expressed in *Apprendi, supra,* 530 U.S. 466. (*Andrades, supra,* 113 Cal.App.4th at pp. 833-834.)

Based upon these authorities, we also conclude that "a prior juvenile adjudication may constitutionally be used as a 'strike' despite the fact that there is

no right to a jury trial in juvenile proceedings." (*Andrades, supra,* 113 Cal.App.4th at p. 834.) Thus, the trial court did not err by using Barno's prior juvenile adjudications as strikes for purposes of sentencing under the Three Strikes Law, and trial counsel's failure to object to the court's use of the prior juvenile adjudications as strikes also did not amount to ineffective assistance of counsel.

VIII. *COURT'S REFUSAL TO DISMISS PRIOR STRIKES*

Barno contends the court abused its discretion by denying his motion to strike two of his juvenile adjudication strike priors under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*). Specifically, Barno asserts it was an abuse of discretion because the two strikes arose from a single criminal act. We reject this contention.

A. *Background*

Barno's juvenile adjudications stemmed from one incident involving two victims. In July 1994, two months before Barno's 18th birthday, he argued with two individuals, a 15-year-old female and a 19-year-old male, who were at his house. Barno told them to leave. He grabbed what appeared to be an AK-47 machine gun with a loaded clip. He pointed the gun at the female victim. The male victim grabbed the barrel and pushed it away. Barno then said, "[Y]ou don't think I won't shoot your fuckin' ass?" The victims started to leave. Barno followed them out of his house, keeping the gun pointed at them. Suddenly, both victims and several neighbors heard a gunshot. The victims then left the area.

At trial, Barno admitted the three prior juvenile adjudications: two counts of assault with a deadly weapon (§ 245, subd. (a)), and one count of negligent discharge of a firearm (§ 246).

At sentencing, Barno moved to strike two of the prior juvenile adjudications. He argued that the case should be treated as a one strike case because the negligent discharge of a firearm and the two counts of assault with a deadly weapon all arose from a single incident.

The court denied the motion to strike. In doing so, the court indicated that it had reviewed the materials submitted by the People and defense counsel, as well as the probation report. The court found that Barno continued to be a danger to others. The court noted that it was reported that during the trial of Barno's case he solicited another inmate to kill Daniell and two other witnesses. The court also stated that the three juvenile adjudications were "serious strikes" involving him pointing a loaded weapon at the victims, threatening to shoot them and then firing a shot. The court also noted that when he was arrested, as a juvenile, he threatened a deputy sheriff stating, "I know where you live. I am going to fuck your wife in front of you, then kill you." The court noted that Barno's record indicated "habitual criminal conduct." As the court put it, "I think one of the most telling things about [Barno] is that he's suffered the consequences and they have slowed him down not at all. He's suffered being locked up for almost four years in C.Y.A., and the first thing he does when he gets out is start having a relationship with an underage girl, stalking, harassing, threatening her, burning her in the face with a cigarette. . . .

[A]nd then we have the amazing series of crimes that you saw in this case . . . ." The probation report indicated that Barno's prior performance on probation and prior performance on C.Y.A. parole were unsatisfactory.

With regard to the current offenses, the court stated that Barno "struck terror into the hearts of many . . . people. They were terrified of him. And it's gone on for years. And it doesn't make any difference. He will terrify whoever he can, primarily women." The court noted that Barno committed the acts even though he had restraining orders against him. The court also noted that throughout the proceedings Barno showed no remorse for what he had done. The court found that this was not the unusual case where Barno was outside the spirit of the three strikes law.

B. *Analysis*

Under section 1385, subdivision (a), a trial court, on its own motion and in furtherance of justice, is permitted to strike prior felony conviction allegations in three strikes cases. (*Romero*, *supra*, 13 Cal.4th at pp. 529-530.)

> [I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to [section] 1385[, subdivision] (a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particu-lars

> of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.

(*People v. Williams* (1998) 17 Cal.4th 148, 161.)

"[A] court's failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) This determination is guided by two fundamental precepts[6] that "establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at p. 377.) ""'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." [Citations.]'" (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 978, cited with approval in *People v. Carmony, supra*, 33 Cal.4th at p. 377.)

In asserting that the court abused its discretion in refusing to strike two of his prior juvenile adjudications, Barno relies on the California Supreme Court case, *People v. Benson* (1998) 18 Cal.4th 24. The defendant in *Benson* had two strikes: residential burglary and assault with intent to commit

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[6] The first precept guiding the review places the burden ""'on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary."'" (*People v. Carmony, supra*, 33 Cal.4th at p. 376.) The second establishes ""'a decision will not be reversed merely because reasonable people might disagree."'" (*Id.* at p. 377.)

murder. Both strikes arose from a knife attack on a single victim inside her apartment. In the underlying prosecution the trial court stayed the sentence imposed for the assault under section 654. When the two convictions were later charged as strikes, the trial court declined to dismiss one of them. The Supreme Court affirmed. It held that the three strikes law reflects a legislative intent to treat as separate strikes convictions for which separate punishment would be barred under section 654. (*People v. Benson, supra,* 18 Cal.4th at pp. 28-29.)

In a footnote cited by Barno, the high court observed,

> Because the proper exercise of a trial court's discretion under section 1385 necessarily relates to the circumstances of a particular defendant's current and past criminal conduct, *we need not and do not determine whether there are some circumstances in which two prior felony convictions are so closely connected—for example, when multiple convictions arise out of a single act by the defendant as distinguished from multiple acts committed in an indivisible course of conduct—that a trial court would abuse its discretion under section 1385 if it failed to strike one of the priors.*

(*People v. Benson, supra,* 18 Cal.4th at p. 36, fn. 8, italics added.)

The Second District Court of Appeal applied the decision in *People v. Benson* to a situation where there were two prior strikes convictions for attempted carjacking and attempted robbery arising

out of one incident, and with one victim. (*People v. Burgos* (2004) 117 Cal.App.4th 1209, 1216.) The defendant urged the trial court to dismiss one of the strike findings because the convictions arose from a single criminal act when he approached a man and demanded his car, but was frightened off. (*Id.* at p. 1212, fn. 3.) The trial court denied his request. (*Id.* at p. 1212.) On appeal, the court agreed with the defendant and concluded that the trial court abused its discretion. (*Id.* at pp. 1216-1217.) The holding on *Burgos*, however, was not based solely on the two prior strike convictions being based on a single act; the court also held the defendant's current offenses were not "under the circumstances, the worst of crimes," and his criminal history, aside from his current convictions and prior strike convictions, consisted of misdemeanors and one felony that was not a strike. (*Id.* at pp. 1216-1217.)

The circumstances presented here do not demonstrate that Barno is so far outside of the spirit of the three strikes law that the court's decision not to dismiss two of his strike adjudications was arbitrary or irrational. First, *People v. Burgos* is distinguishable from the situation presented here because, although the prior juvenile adjudications resulted from one incident, there were two victims. Further, the current convictions, consisting of a total of nine felony counts, were serious crimes. Additionally, Barno's background, character and prospects demonstrate that he falls well within the spirit of the three strikes law. His recidivist nature, and failure in the past to perform satisfactorily on probation and parole, "'reveals that [he] had been taught, through the application of formal sanction, that [such] criminal

conduct was unacceptable–but had failed or refused to learn his lesson.'" (*People v. Williams*, *supra*, 17 Cal.4th at p. 163, quoting *People v. Gallego* (1990) 52 Cal.3d 115, 209, fn. 1 (conc. opn. of Mosk, J.).)

In sum, the court's decision to deny Barno's motion under *Romero*, *supra*, 13 Cal.4th 497 was not "so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony*, *supra*, 33 Cal.4th at p. 377.)

DISPOSITION

The judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

McDONALD, J.

Court of Appeal, Fourth District, Div. 1 – No. D045992

S153796

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

THE PEOPLE, Plaintiff and Respondent,

v.

RODNEY BERNARD BARNO, Defendant and Appellant.

The petition for review is denied.

Kennard, J., is of the opinion the petition should be granted.

SUPREME COURT
FILED

Aug – 8, 2007
Frederick K. Ohlrich,
Clerk

GEORGE
Chief Justice

TEXT OF CALIFORNIA PENAL CODE SECTIONS

On the pages that follow the Court will find the text of California Penal Code sections cited in the petition. Each section listed is a section of the California Penal Code as reported on Westlaw.

§ 18

"Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony, or to be punishable by imprisonment in a state prison, is punishable by imprisonment in any of the state prisons for 16 months, or two or three years; provided, however, every offense which is prescribed by any law of the state to be a felony punishable by imprisonment in any of the state prisons or by a fine, but without an alternate sentence to the county jail, may be punishable by imprisonment in the county jail not exceeding one year or by a fine, or by both."

§ 19

"Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars ($1,000), or by both."

§ 422

"Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

[Subsequent paragraphs of this section are not relevant and therefore not printed.]

§ 594 [only subsections (b)(1) and (b)(2) are printed:]

"(b)(1) If the amount of defacement, damage, or destruction is four hundred dollars ($400) or more, vandalism is punishable by imprisonment in the state prison or in a county jail not exceeding one year, or by a fine of not more than ten thousand dollars ($10,000), or if the amount of defacement, damage, or destruction is ten thousand dollars ($10,000) or more, by a fine of not more than fifty thousand

dollars ($50,000), or by both that fine and imprisonment."

"(2)(A) If the amount of defacement, damage, or destruction is less than four hundred dollars ($400), vandalism is punishable by imprisonment in a county jail not exceeding one year, or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment."

§ 646.9 [Only subsection (a) is printed]

"(a) Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.

(b) Any person who violates subdivision (a) when there is a temporary restraining order, injunction, or any other court order in effect prohibiting the behavior described in subdivision (a) against the same party, shall be punished by imprisonment in the state prison for two, three, or four years."

§ 653m(a)

"Every person who, with intent to annoy, telephones or makes contact by means of an electronic communication device with another and addresses to or about the other person any obscene language or addresses to the other person any threat to inflict injury to the person or property of the person addressed or any member of his or her family, is guilty of a misdemeanor. Nothing in this subdivision shall apply to telephone calls or electronic contacts made in good faith."

§ 667 [Only pertinent parts are printed]

"(b) It is the intent of the Legislature in enacting subdivisions (b) to (i), inclusive, to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses."

...

"(d) Notwithstanding any other law and for the purposes of subdivisions (b) to (i), inclusive, a prior conviction of a felony shall be defined as:

...

"(3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if: (A) The juvenile was 16 years of age or older at the time he or she committed the prior

offense. (B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a felony. (C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law. (D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of the Section 707 of the Welfare and Institutions Code."

...

"(e)(2)(A) If a defendant has two or more prior felony convictions as defined in subdivision (d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of ..."

"(ii) Imprisonment in the state prison for 25 years."

1170(a)(3)

"In any case in which the punishment prescribed by statute for a person convicted of a public offense is a term of imprisonment in the state prison of any specification of three time periods, the court shall sentence the defendant to one of the terms of imprisonment specified unless the convicted person is given any other disposition provided by law, including a fine, jail, probation, or the suspension of impo-

sition or execution of sentence ..." [The rest of this section is not relevant to issues in this case.]

1170.1(a)

"... when any person is convicted of two or more felonies,...and a consecutive term of imprisonment is imposed...the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, ... The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses."

§ 1170.12 [this is a version of the three strikes law that was enacted by the electorate after the legislature enacted the three strikes law codified in Penal Code section 667, subdivisions (b) through (i). The law enacted in Penal Code section 1170.12 is, for all purposes in this case, identical to the law in Penal Code section 667, subdivisions (b) through (i), enacted by the legislature.]